U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-R-A-

DATE: FEB. 27, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an entrepreneur, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After the petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Petitioner appealed the matter to us, and we dismissed the appeal.[1]

The matter is now before us on a motion to reopen. On motion, the Petitioner submits a brief and additional evidence.

Upon review, we will deny the motion.

I. LAW

A motion to reopen is based on documentary evidence of new facts, and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2).

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an

[1] *See Matter of A-R-A-*, ID# 399777 (AAO August 15, 2017).

individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> > (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> > (B) Waiver of job offer –
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> > > (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

While neither the statute nor the pertinent regulations define the term "national interest," *Dhanasar* stated that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[2]

II. ANALYSIS

A. Background

The Petitioner has stated that he is and will continue to be the chief executive officer (CEO) of [redacted] a company that he founded and in which he owns a 91% ownership interest. In his initial filing, the Petitioner indicated that [redacted] purchases personal electronics products from U.S. based distributors and sells them to national and international customers with a mission to "provide customers with a complete selection of unique digital imaging products, cell

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

phones, tablets, and other consumer electronics at competitive prices and with fast shipping to expedite order fulfillment."

The Director denied the petition finding that the Petitioner qualifies as a member of the professions holding an advanced degree, but that he did not establish that waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. The Petitioner filed an appeal. Subsequent to the appellate filing, we set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[3] The Petitioner offered a supplemental brief asserting eligibility under *Dhanasar*. In April 2017, we issued a request for evidence (RFE) asking the Petitioner to provide additional evidence satisfying the three-part framework set forth in that precedent decision. He responded through counsel directing us to the supplemental brief. We dismissed the appeal, addressing the arguments presented in the supplemental brief, but finding the Petitioner had not established eligibility for a national interest waiver. Specifically, while he demonstrated that he is well positioned to serve as [redacted] CEO under the second prong of the *Dhanasar* framework, we found the Petitioner had not provided sufficient evidence or information showing that his proposed endeavor was of national importance, as required under the first prong.[4] The Petitioner now files the current motion to reopen providing additional evidence of his eligibility. We will deny the motion for the reasons discussed below.

B. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' definition of "new" at 8 C.F.R. § 1003.23(b)(3) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean ones that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

In our previous decision, we noted that under *Dhanasar*, an endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, may well be understood to have national importance. We indicated, however, that the Petitioner did not provide information showing future anticipated revenue and staffing levels, or an explanation of how these metrics demonstrate that his endeavor will offer substantial economic benefits to the region in which the business is located or to the nation. For

[3] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[4] We noted that, as the Petitioner had not met the first prong of the *Dhanasar* framework, he is not eligible for a national interest waiver and further discussion of the balancing factors under the third prong would serve no meaningful purpose.

example, we found that the Petitioner did not provide an updated business plan or any revised projections for future growth and hiring, nor did he offer evidence that his work stands to have positive economic effects that reach beyond to affect the regional or national economy more broadly. Accordingly, we found that his proposed work did not meet the "national importance" element of the first prong of the *Dhanasar* framework.

On motion, the Petitioner offers a copy of September 2017 business plan, including company hiring, growth projections, and industry analysis. He maintains that his proposed endeavor of leading as its CEO is of national importance for three reasons. First, the Petitioner avers that the company's economic metrics, including revenue, profit, payroll expenses, and corporate tax projections, provide a substantial economic benefit to the U.S. economy. Second, he argues that work significantly benefits its corporate suppliers, including its largest supplier, Finally, he states that his business endeavor "through rapid growth and improved sales, will also contribute to the growth of other US businesses," including both its freight forwarders and logistics partners, and an improved presence of American brands in underserved overseas markets. We consider each below.

First, the Petitioner asserts that stands to have a "tremendous market impact" resulting in a substantial economic benefit to the United States, citing the company's net profit, as well as payroll expenses and total taxes paid. He states that the company "contributes to the U.S. economy by being an export-oriented company and paying taxes on profits," and that "the company's net profit, as well as its payroll expenses will increase, thus increasing total taxes paid." According to the business plan, the company's net profit is projected to be $476,104 in 2018, rising to $1,155,772 in 2021. The payroll taxes are also forecast to rise from $78,278 in 2018 to $139,255 in 2012, and its anticipated payroll expenses are projected to grow from an estimated $521,850 in 2018 to $928,369 in 2021. The business plan also includes a personnel summary stating that the company will reach a total headcount of 17 employees in 2021, including plans to open a second office location in Florida, to support its planned South American expansion, staffed with a sales representative, an office manager, and a shipping representative.

However, the documentation submitted does not explain how these metrics demonstrate that his endeavor will offer substantial economic benefits to the region in which the business is located or to the nation, nor did he offer evidence that his work stands to have positive economic effects that reach beyond to affect the area more broadly. The Petitioner did not provide sufficient information explaining, for example, how the company's anticipated profit margins of 1%-2% and payroll tax amounts represent a substantial economic benefit to the regional or national economy, or how its sales projections represent a significant market share in the consumer electronic devices wholesale market. Further, while the Petitioner provided industry data forecasting growth in the consumer electronics industry over the next five years, he did not offer information or evidence explaining specific role in the growth of this industry. Finally, he did not establish that a business employing 17 individuals in either New Jersey, or Florida, stands to significantly impact employment levels in either location.

Overall, the economic metrics provided indicate that the Petitioner's business is growing but they do not show that any benefits to the regional or national economy would reach the level of "substantial economic benefit" contemplated by *Dhanasar*. In *Dhanasar*, we held that an endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance. Here, the Petitioner has not offered evidence that the area where the company is located is economically depressed or that the company would offer the region a substantial economic benefit through its employment levels or otherwise. Further, in the same way that *Dhanasar* finds that a classroom teacher's proposed endeavor is not nationally important because the effects of his/her work are primarily limited to his/her school or district, we find that the proposed endeavor in this case will not sufficiently extend beyond [redacted] to affect the regional or national economy more broadly.[5] As such, based upon the business metrics provided, the Petitioner has not established that his proposed endeavor is of national importance.

Second, the Petitioner further avers on motion that his work stands to benefit [redacted] corporate suppliers, including its largest purveyor, [redacted].[6] On motion, he states that "[redacted] is one of the leading distributors of [redacted] overseas," and that it will "contribute to the improved presence of American brands, such as [redacted] in the currently underserved markets of the Middle East and Asia." The Petitioner provided little information to support his contention. For instance, he did not provide evidence from [redacted] attesting to the importance of the company's contributions to [redacted] overall business revenue. The record does not show that [redacted] is one of [redacted] leading distributors, nor does the Petitioner explain its impact on this company's overseas market share, or presence in new or emerging markets. Further, he did not provide evidence corroborating that the Middle East or Asia are currently underserved by U.S. suppliers in the personal electronic device market.[7] Nor has the Petitioner provided letters from relevant government entities, business partners, or established business associations with knowledge of the entity's products or services which indicate that [redacted] business activity stands to significantly benefit other United States brands by opening the aforementioned foreign markets to other U.S. companies.

The Petitioner's submission on appeal stated that [redacted] use of transportation and shipping providers represents a substantial economic benefit to the economy, but we found that the record did not sufficiently corroborate that assertion. He claimed that the volume of goods bought and sold will offer a substantial economic benefit because the company's use of shipping providers and freight forwarders to distribute products furthers the national interest. The Petitioner maintained that, based upon its past record of gross revenue exceeding $72 million,[8] its contracts with freight and shipping companies to transport this large quantity of inventory will continue to "inject the U.S. economy

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[5] *See Dhanasar*, 26 I&N Dec. at 893.

[6] The Petitioner notes that 70% of [redacted] products are purchased wholesale from [redacted]

[7] We note that any economic benefit to underserved markets abroad is not germane to whether the Petitioner's proposed endeavor is of national importance to the United States.

[8] Tax returns reflect that [redacted] annual gross revenue exceeded $73 million in 2015, and its cost of goods sold exceeded $72 million, resulting in a profit of $911,485.

with a beneficial infusion of trade and financial activity, which should be considered for its impact on the U.S."

On motion, the Petitioner reiterates this argument stating that the company has plans to expand into South American markets and that "through the rapid growth and improved sales, [redacted] will also contribute to the growth of other U.S. businesses," including increases in "payments it makes to the vendors and shipping companies it works with in the United States." He states that the company has "already paid a total of $110,000 to [redacted] and $90,000 to [redacted] so far in 2017." The record includes invoices and contracts with transport companies ranging in value from a couple of hundred dollars to several thousand dollars. In addition, the 2015 tax returns reflect that the company paid $207,390 in shipping costs in 2015. The Petitioner does not explain how these expenses stand to have substantial positive economic effects on U.S. shipping interests. For example, he did not offer comparative statistics, industry data, or other economic metrics indicating that [redacted] use of these service providers at these levels will result in significant benefits for the shipping providers, the freight industry generally, or the economy in which these providers operate. Further, he does not offer evidence documenting what percentage of the providers' business [redacted] represents, or establish that its business activity results in increased staffing levels at its providers or an improved presence of American brands in underserved overseas markets. For the above reasons, we affirm our previous finding that the Petitioner has not established that his proposed endeavor is of national importance under the first prong of the *Dhanasar* framework.

Finally, as explained above, the third prong requires the Petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. On motion, the Petitioner contends that he seeks a national interest waiver because it is impractical for an entrepreneur or self-employed inventor, when advancing an endeavor on his own, to secure a job offer from a U.S. employer, and there is no provision in the Department of Labor regulations permitting a self-petitioning entrepreneur to file a labor certification. He maintains that the purpose of the third prong was to "expand the reach of the national interest waiver, especially for entrepreneurs." However, as the Petitioner has not established the national importance of his proposed endeavor(s) as required by the first prong of the *Dhanasar* framework, he is not eligible for a national interest waiver and further discussion of the balancing factors under the third prong would serve no meaningful purpose.

III. CONCLUSION

The record, including new information and evidence provided in the Petitioner's motion to reopen, does not demonstrate his eligibility for the benefit sought. As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established that he is eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The motion to reopen is denied.

Cite as *Matter of A-R-A-*, ID# 943712 (AAO Feb. 27, 2018)